Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22C-78–09 OF 2019
LIM CHONG FONG J
3 JULY 2020

Civil Procedure — Stay of proceedings — Application for stay to be referred to arbitration — Whether application to stay of proceedings should be allowed — Arbitration Act 2005 s 10(1)

This was an application to stay the suit to be referred to arbitration. The plaintiff and the defendant were private limited companies involved in the construction business. By a letter of award dated 2 September 2014 ('the contract'), the defendant appointed the plaintiff to carry out and complete the supply, delivery, installation, testing and commissioning of the firefighting services, cold water, sanitary system and LPG system ('the works') for the 'revitalization works for the Kompleks Tun Abdul Razak (KOMTAR) building' in Penang ('the project'). After having carried out the works, the plaintiff made a claim against the defendant for RM1,910,405.52 for unpaid work done. By reason of the failure, neglect or refusal of the defendant to make the payment as claimed, the plaintiff instructed its solicitors Messrs TG Lim & Partners to make a written demand dated 18 April 2019 upon the defendant. However as the result of the defendant's continuing failure to make payment, the plaintiff commenced the present suit on 30 September 2019. After having been served the writ by the plaintiff, the defendant entered its appearance on 15 October 2019. The defendant then on 1 November 2019 filed third party proceedings against Magnificent Empire Sdn Bhd which appointed the defendant to carry and complete the project that formed the subject matter of the disputes and differences between the plaintiff and defendant. The third party proceedings was subsequently discontinued on 14 November 2019. On 5 November 2019, the defendant simultaneously filed its defence as well as the present application to stay the suit to be referred to arbitration. The plaintiff opposed the application because the defendant has allegedly admitted to the debt owing; hence there was no dispute as well as the defendant had allegedly taken a step in the suit by having filed its defence as well as third party proceedings.

Held, allowing the application with cost:

(1) The courts must refer the dispute to arbitration if there were a valid arbitration agreement made between the parties unless the defendant had taken a step in the court proceedings. It was adequate of the defendant

having filed the application demonstrating the existence of a valid arbitration agreement in response to the plaintiff's suit. The determination of whether a step had been taken had to be evaluated by examining the defendant's conduct as to whether it had unequivocally made the election to abandon its right to stay the suit for referral to arbitration when served with the suit (see paras 17 & 20–21).

(2) The defendant did not harbour the intention to waive or abandon its right to have the dispute with the plaintiff determined via arbitration. It was clear that the defendant had reserved its right notwithstanding having simultaneously filed its defence. The defendant had accordingly not taken a step in the suit for purposes of s 10 of the Arbitration Act 2005. The defendant was worried of judgment in default of defence entered by the plaintiff if the defence was not filed. Upon the filing of an application under s 10 of the Arbitration Act 2005, the defence need not be filed until the disposal of that application and so ordered by the court. The court did not consider that the defendant having filed the third party notice because a third party proceeding was generally considered as a separate and independent suit following the Supreme Court case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (see paras 24–25).

[Bahasa Malaysia summary

Ini adalah permohonan untuk penggantungan tuntutan untuk dirujuk ke timbang tara. Plaintif dan defendan adalah syarikat sendirian berhad yang terlibat dalam perniagaan pembinaan. Dengan surat penganugerahan bertarikh 2 September 2014 ('kontrak'), defendan melantik plaintif untuk melaksanakan dan menyempurnakan pembekalan, pengiriman, pemasangan, pengujian dan pentauliahan perkhidmatan pemadam kebakaran, air dingin, sistem kebersihan dan sistem LPG ('kerja-kerja') untuk 'kerja-kerja revitalisasi untuk bangunan Kompleks Tun Abdul Razak (KOMTAR)' di Pulau Pinang ('projek'). Setelah menjalankan kerja-kerja tersebut, plaintif membuat tuntutan terhadap defendan dengan bayaran RM1,910,405.52 untuk kerja yang belum dibayar. Dengan alasan kegagalan, pengabaian atau keengganan defendan untuk membuat pembayaran seperti yang dituntut, plaintif mengarahkan peguamnya Tetuan TG Lim & Partners untuk membuat tuntutan bertulis bertarikh 18 April 2019 ke atas defendan. Namun, sebagai akibat dari kegagalan berterusan defendan untuk membuat pembayaran, plaintif memulakan tuntutan ini pada 30 September 2019. Setelah diserahkan oleh plaintif, defendan memasuki kehadirannya pada 15 Oktober 2019. Kemudiannya, defendan pada 1 November 2019 mengemukakan prosiding pihak ketiga terhadap Magnificent Empire Sdn Bhd yang melantik defendan untuk menjalankan dan menyelesaikan projek yang menjadi perkara utama pertikaian dan perbezaan antara plaintif dan defendan. Prosiding pihak ketiga kemudiannya dihentikan pada 14 November 2019. Pada 5 November 2019,

defendan secara serentak mengemukakan pembelaannya dan juga permohonan ini untuk menangguhkan saman untuk dirujuk kepada timbang tara. Plaintif menentang permohonan itu kerana defendan telah mengaku berhutang; oleh itu, tidak ada perselisihan dan defendan telah terlibat dalam tindakan saman dengan mengajukan pembelaan dan juga proses pihak ketiga.

Diputuskan dengan membenarkan permohonan dengan kos:

(1) Mahkamah harus merujuk pertikaian tersebut ke timbang tara jika ada perjanjian timbang tara yang sah yang dibuat antara para pihak kecuali defendan telah mengambil langkah dalam proses mahkamah. Cukup bagi defendan yang telah memfailkan permohonan yang menunjukkan adanya perjanjian timbang tara yang sah terhadap tuntutan plaintif. Penentuan sama ada suatu langkah telah diambil harus ditentukan dengan memeriksa perlakuan defendan mengenai sama ada telah membuat pilihan secara tegas untuk melepaskan haknya untuk tetap penangguhan agar tuntutan tersebut dirujuk ke timbang tara ketika diserahkan dengan tuntutan tersebut (lihat perengan 17 & 20–21).

(2) Defendan tidak menunjukan niat untuk mengetepikan atau meninggalkan haknya untuk memutuskan persengketaannya dengan plaintif melalui timbang tara. Ia adalah jelas bahawa defendan telah mempertahankan haknya walaupun telah mengemukakan pembelaannya secara serentak. Oleh itu, defendan tidak mengambil langkah dalam saman tersebut seperti dinyatakan dalam s 10 Akta Timbang Tara 2005. Defendan bimbang akan penghakiman terhadap pembelaan yang tidak dijawab oleh pihak plaintif jika pembelaan tidak difailkan. Setelah memfailkan permohonan di bawah s 10 Akta Timbang Tara 2005, pembelaan tidak perlu difailkan sehingga pelupusan permohonan itu dan diperintahkan oleh mahkamah. Mahkamah tidak mempertimbangkan defendan telah mengemukakan notis pihak ketiga kerana proses pihak ketiga secara amnya dianggap sebagai tuntutan saman yang terpisah dan bebas berikutan kes Mahkamah Agung *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (lihat perenggan 24–25).]

Cases referred to

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625; [2013] 7 CLJ 18, FC (refd)

C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd [2019] MLJU 347; [2019] 3 AMR 780, HC (refd)

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177; [1984] 1 LNS 166 (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)

A *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 5 AMR 635, FC (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC
B (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd c Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273; [1996] 1 CLJ 231, FC (refd)
Y-TEQ Auto Parts (M) Sdn Bhd v X1R Global Holding Sdn Bhd (formerly known as Quantum Global Far East) & Anor [2017] 2 MLJ 609; [2017] 3 CLJ 454,
C CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
D Arbitration Act 2005 s 10

Lim Tow Gim (TG Lim & partners) for the plaintiff.
Balbir Singh (Najiana Wan Balbir) for the defendant.

E **Lim Chong Fong J:**

INTRODUCTION

[1] This is an application to stay the suit to be referred to arbitration.

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[2] The plaintiff is a private limited company involved in the construction business.

[3] Likewise, the defendant is a private limited company involved in the
G construction business.

BACKGROUND FACTS

[4] By a letter of award dated 2 September 2014 ('contract'), the defendant
H appointed the plaintiff to carry out and complete the supply, delivery, installation, testing and commissioning of the fire fighting services, cold water, sanitary system and LPG system ('works') for the 'Revitalization works for the Kompleks Tun Abdul Razak (KOMTAR) building' in Penang ('project').

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[5] After having carried out the works, the plaintiff made a claim against the defendant for RM1,910,405.52 for unpaid work done.

[6] By reason of the failure, neglect or refusal of the defendant to make the payment as claimed, the plaintiff instructed its solicitors Messrs TG Lim & Partners to make a written demand dated 18 April 2019 upon the defendant.

[7] However as the result of the defendant's continuing failure to make payment, the plaintiff commenced this suit on 30 September 2019.

[8] After having been served the writ by the plaintiff, the defendant entered its appearance on 15 October 2019.

[9] The defendant then on 1 November 2019 filed third party proceedings against Magnificent Empire Sdn Bhd which appointed the defendant to carry and complete the project that formed the subject matter of the disputes and differences between the plaintiff and defendant. The third party proceedings was subsequently discontinued on 14 November 2019.

[10] On 5 November 2019, the defendant simultaneously filed its defence as well as this application to stay the suit to be referred to arbitration ('application').

[11] The affidavits that were filed for purposes of this application are as follows:

(a) defendant's application in support affirmed by Lim Chip Keong dated 4 November 2019;

(b) plaintiff's affidavit in reply affirmed by Tan Bak Eam dated 21 November 2019;

(c) plaintiff's further affidavit affirmed by Tan Bak Eam dated 21 November 2019;

(d) defendant's further affidavit affirmed by Lim Chip Keong dated 7 February 2020; and

(e) plaintiff's affidavit in reply to defendant's further affidavit affirmed by Tan Bak Eam dated 19 February 2020.

[12] The application came before me for hearing on 23 January 2020, 5 and 21 February 2020. After hearing counsel, I adjourned my decision to deliberate on the arguments advanced by them.

[13] Now having done so, I hereby furnish my decision below together with the supporting grounds.

A CONTENTIONS AND FINDINGS

[14] It is provided as follows in cl 1 of the contract:

> The Articles of Agreement and Conditions of Contract shall be those contained in the PAM form of contract 2006 (without quantity).

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Hence, it is common ground which is not seriously disputed by the parties that there is a binding arbitration agreement as contained in cl 34 of the PAM form of contract. It suffices if an arbitration agreement has been incorporated by reference following the Federal Court case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 7 CLJ 18.

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[15] In the Federal Court case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd c Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273; [1996] 1 CLJ 231, Gopal Sri Ram JCA (later FCJ) held as follows:

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> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of the contract to arbitrate. However, the Court could, in the exercise of its discretion stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a Court which has none, there can be no consensual ousting of a Court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co. Ltd., Hong Kong* [1995] 1 MLJ 322; [1995] 4 CLJ 164.

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This case was decided in the context of the Arbitration Act 1952 where the court has the discretion whether to stay the court proceedings pursuant to s 6 thereunder.

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[16] For purposes of this application, it is now governed as follows by s 10 of the Arbitration Act 2005 which repealed s 6 of the Arbitration Act 1952:

> 10 Arbitration agreement and substantive claim before court
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> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
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> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
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> (2A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest —

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(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(2C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the Rules of the High Court 1980 and proceedings commenced pursuant to paragraph 24(b) of the Courts of Judicature Act 1964.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[17] Consequently albeit the jurisdiction of the courts is never ousted, the courts must refer the dispute to arbitration if there is a valid arbitration agreement made between the parties unless the defendant has taken a step in the court proceedings. This has been made clear in the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 5 AMR 635 where Ramly Ali FCJ held as follows with emphasis added by me:

[32] *The clear effect of the present s 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.*

[33] *What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference. (see TNB Fuel Services Sdn Bhd). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.*

Furthermore in the case of *FAMG Idaman Resources v Jasmadu Sdn Bhd* [2019] 1 AMR 158; [2018] 1 LNS 1108, Lee Swee Seng J (now JCA) held as follows:

[20] The mandatory nature of the new s 10 of the AA 2005 had been highlighted in a number of cases. The current position is that once there is an arbitration agreement and that the party applying for stay has not taken any other steps in the proceedings, a stay is mandatory and the court shall grant a stay. It is otherwise if it can be shown that the arbitration agreement is null and void, inoperative or incapable of being performed. Here it is not in dispute that there is an arbitration agreement and that the defendant had not taken other steps in the proceedings other than entering an appearance.

> [21] Whilst under the old Arbitration Act 1952 ('AA 1952') the word used was 'may', under the new Arbitration Act 2005 the word used is now 'shall', signifying a clear shift towards referring such a matter to arbitration and indeed making it mandatory as opposed to the old Arbitration Act 1952 where the discretion is reposed with the court on whether or not to grant stay ...

[18] The plaintiff here is opposing the application because the defendant has allegedly admitted to the debt owing; hence there is no dispute as well as the defendant has allegedly taken a step in the suit by having filed its defence as well as third party proceedings.

[19] In respect of the former on the absence of a dispute, the plaintiff relied on the cases of *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 and *Y-TEQ Auto Parts (M) Sdn Bhd v X1R Global Holding Sdn Bhd (formerly known as Quantum Global Far East) & Anor* [2017] 2 MLJ 609; [2017] 3 CLJ 454 to show that the defendant has admitted to the plaintiff's claims because the defendant did not answer to certain material averments in the plaintiff's affidavits. Hence there is no dispute to be arbitrated according to the plaintiff following the case of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177; [1984] 1 LNS 166.

[20] It is however plain from the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* that it is unnecessary of the defendant to establish that there is a dispute over the plaintiff's claim before s 10 of the Arbitration Act can be invoked unlike that pursuant to s 6 of the Arbitration Act 1952 where the case of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* has been premised. In other words, it is adequate of the defendant having filed the application demonstrating the existence of a valid arbitration agreement in response to the plaintiff's suit. The existence of a dispute or otherwise between the parties would have to be dealt by the arbitrator in the arbitration proceedings.

[21] At to the latter in respect of steps having been taken in the suit, it was held by Edgar Joseph Jr SCJ in the Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716 as follows:

> In *Roussel-Uclaf v Searle* [1978] 1 Lloyd's Report 225, one of the issues which arose for decision was whether resisting an application for an interlocutory injunction by putting in evidence and appearing in Court was a step.
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> In the course of his judgment, Graham J. having referred to *Zalinoff v Hammond* [1898] 2 Ch 92 and *Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151 *said this at p 231 col 2 para 3 to p 232 col 2 para 1:*
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> > ... On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow

by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time, as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalise Searle (UK) in that respect. I do not think the present case is covered by the authority of Pitcher's case and it seems to me that the reasoning of Mr Justice Stirling in the *Zalinoff* case is more pertinent to the circumstances here where an application for an injunction was being resisted.

I therefore, hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.

Before us, perhaps understandably, counsel for the sub-contractor, conceded — we think quite correctly — that this particular ground relied upon by the judge was untenable.

In our view, regard being had to the circumstances outlined above, the Judge ought to have held that the conduct of the contractor did not indicate an election to abandon its right to a stay nor did it have the effect of invoking the jurisdiction of the court and so the contractor had not taken a step in the proceedings.

Put simply, the determination of whether a step had been taken has to be evaluated by examining the defendant's conduct as to whether it had unequivocally made the election to abandon its right to stay the suit for referral to arbitration when served with the suit. It is fact sensitive depending on the circumstances of the case.

[22] In this connection, I have recently held as follows in *C & B Global Sdn Bhd v Getthiss (M) Sdn Bhd* [2019] MLJU 347; [2019] 3 AMR 780 on a similar though not identical circumstances:

[23] The main plank of the plaintiff's opposition is that the defendant had taken steps in the proceedings prior to the filing of the application and is therefore disqualified or is estopped from relying on s 10 of the AA. In this regard, the defendant had requested from the plaintiff an extension of time to file the defence as well as having filed the defence before filing this application; hence it is fatal according to the plaintiff.

[24] The plaintiff relied on *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2010] 3 CLJ 634 *wherein Mary Lim JC (now JCA) held as follows:*

[15] From the facts in this case it is clear that the defendant has abandoned its right to arbitration by requesting for time to file defence. A defence is only filed

where a party intends to defend an action such as is the case here. This can be seen from O 18 r 2(1) Rules of the High Court 1980 (RHC 1980). That order provides that where a defendant intends to defend the action instituted, the next step after an entry of a memorandum of appearance is to serve a defence on the plaintiff within the prescribed period unless granted leave to the contrary by the court:

2(1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

[16] The time period prescribed under O 18 r 2 may on application be extended by the court. Alternatively, it may be extended by consent of the parties involved. This is provided under O 3 r 5(3) RHC 1980:

5(1) ...

(2) ...

(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

[17] From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff s 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact I am inclined to go further to say that because of the language deployed in s 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.

[25] On the other side, the defendant relied on the Federal Court case of *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213 wherein Mohtar Abdullah FCJ held as follows albeit in the context of the Arbitration Act 1952 which is not dissimilar in respect of the taking of steps in the Suit with emphasis added by the defendant:

Therefore, the legal position in Malaysia may be neatly summarized as follows:

(a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from

applying for a stay of proceedings to refer the dispute to arbitration; A

(c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration. B

Additionally in *Mun Seng Fook v AIG Malaysia Insurance Berhad* [2019] 7 MLJ 59; [2018] 8 CLJ 394; [2018] 1 LNS 282, Noorin Badaruddin J held as follows in the context of the present AA with emphasis added by the defendant:

[17] Back in Malaysia, in *CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd* [2015] 11 MLJ 485; [2015] 1 LNS 149 ; Dato' Mary Lim Thiam Suan J (as Her Ladyship then was) had refused a stay application as Her Ladyship found that the defendant therein had taken step in the proceedings before filing the application for stay. Earlier in *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634; Her Ladyship expressed her view that a party who seeks to rely on the arbitration clause and stay proceedings in court must make the application promptly even before filing appearance. In CLLS Power System Sdn Bhd Her Ladyship discussed as follows: C D

[30] In *Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd* [2009] MLJU 286; [2010] 3 CLJ 634; [2009] 1 LNS 278, I had expressed the view that with the mandatory terms in s 10, applicants who seek to rely on the arbitration clause and stay proceedings in court must make the application for stay promptly, even before filing of an appearance. I had made that observation after discussing the Federal Court's decision in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213. In Sanwell, again, a case decided under the old Arbitration Act 1952, the Federal Court had observed and distinguished the facts in another case, that of *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691; [1998] 2 CLJ Supp 131; [1998] 2 BLJ 131, that the defendant there had taken 'more than one step in the proceedings, ie one step in filing the conditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s 6 of the Act, the second step certainly was'. In Winsin Enterprise, an order for stay under s 10 was refused because the defendant had sought and was granted by the plaintiff, an extension of time to file defence. I took the view that the act of seeking for an extension of time to file defence was a step taken in the proceedings in court, depriving the defendant order of stay sought. E F G H

[31] It is the view of this court that with the new Rules of Court 2012 doing away with the filing of conditional appearance, there is now greater reason to insist on strict compliance with the provisions of Act 646. Added to this are the recent amendments to Act 646 which remind the court of non-intervention save in matters expressly provided — see s 8 of Act 646. I

[32] Now, s 10 requires an applicant such as the defendant to file for a stay of the proceedings in court 'before taking any other steps in the proceedings'. In fact,

such an application may be made through the procedure provided under s 50. The object of such a requirement is clearly to preserve the defendant's position of non-submission to jurisdiction for the purpose of resolving the dispute or claim in question. Once the defendant has made that application, it may take any other step and that would not compromise or taken as having compromised the defendant's position on the appropriate forum for resolution of the dispute or claim.

[18] In *CLLS Power System Sdn Bhd* the notice to produce was issued without qualification or reservation. In that case the court was of the view that the dictates of s 10 of the Act do not permit the defendant to take any other steps save for applying for a mandatory stay. A step in the proceedings is an act which invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed.

[19] Returning to the present case, after the filing of appearance on 10 July 2017 followed by the respondent's letter of 11 July 2017 requesting for an extension of time to file the statement of defence and the grant of such request by the learned sessions judge, there was no indication whatsoever from the respondent to the appellant or the court that an application for stay of the writ action will be filed and that it intends to take up the matter to arbitration. Nothing was stated in the respondent's letter that the application for such extension is without prejudice to its' right to apply for stay of proceedings.

[26] It can therefore be distilled and discerned from these cases that the primary concern of the Court would be to ascertain whether the applicant in the circumstances is unequivocal in its intention to have the dispute in the action referred to arbitration. Ordinarily, it is plain that a voluntary and unqualified request for extension of time to file the defence or the filing of the defence itself tantamount to taking a step thus forfeiting the right to have the dispute referred to arbitration.

[27] In *Apex Marble Sdn Bhd & Anor v Leong Tat Yan* [2018] MLJU 39; [2018] AMEJ 0033, S Nantha Balan J held as follows:

[62] The defendant's challenge to the authority of the solicitors to act for the plaintiffs is not a submission to the jurisdiction of this court. The filing of a defence and counterclaim was necessary as the court had, during case management, directed the defendant to file the cause papers as the case was moving towards trial. In conclusion on this point, based on the case law authorities and the facts and circumstances of the case, I am of the view that the suggestion that the defendant had taken multiple or any steps which precluded him from applying for stay of proceedings under s 10(1) of the Arbitration Act 2005, is untenable.

[28] Likewise in this suit, the defendant was during the case management on January 3, 2019 which was the next working day after the filing of its appearance directed by the deputy registrar to file its defence within the prescribed time in the Rules of Court 2012. The defendant was hence necessitated to seek an extension of time to file and thereafter file its defence in compliance with the aforesaid court directive. However the defendant expressly reserved its right to refer the dispute to arbitration in paragraph 25 of its defence.

[29] In the English case of *Laker Vent Engineering Ltd v Jacobs E&C Ltd & Anor* [2014] EWHC 1058 (TCC), Ramsey J held as follows:

> [31] The question of reservation of right in relation to jurisdictional or other challenges arises both in the courts and in arbitration in relation to jurisdiction. The courts have brought in express provisions in CPR 11 and in relation to arbitration there are now provisions in ss 72 and 73 of the Arbitration Act 1996. In adjudication there are no statutory provisions and in my judgement, it is appropriate to see how the common law dealt with the provision in relation to arbitration before it was the subject of statutory provisions. On that basis and given the observations of Waller LJ in *Bothma v Mayhaven Healthcare Ltd* (2007) 114 Con LR 131 at [14] I am in no doubt that a general reservation of rights is sufficient to prevent a party's participation in an adjudication from being taken as an election to affirm the adjudicator's jurisdiction or a waiver of any rights to object to the adjudicator's jurisdiction.
>
> Consequently, I see no reason why this principle could and should not be extended to the reservation of rights in court including for referral of disputes to arbitration in the context of s 10 of the AA. There seems no case authority on point presently. Upon my reading of paragraph 25 of the defence, it is nonetheless clear that the defendant has reserved its right to have the dispute referred to arbitration.
>
> [30] In the unique circumstances of this case, I am convinced that the defendant has the genuine intention to have its dispute with the plaintiff arbitrated as agreed. There is also no reason why they should not be held to their bargain. As to the defendant's request for an extension of time to file its defence and the subsequent filing of the defence, I am satisfied that it was not done by the defendant voluntarily but out of necessity pursuant to the direction of the court. The defendant should not therefore be faulted for having taken steps in the suit and hence deem to have waived or abandoned its rights to have the dispute arbitrated. I therefore find and hold that the defendant had not taken steps in the suit for purposes of s 10 of the AA.

[23] On the facts here, I find that the defence and the application were simultaneously filed on the same day. According to the defendant, it was done on a precautionary 'belt and brace' approach to avoid judgment in default taken by the plaintiff. Most pertinently, I observed that the defendant has unequivocally stated as follows in para 3 of the defence:

> 3. Tanpa prejudis kepada Pembelaan ini, Defendan menyatakan dan akan menyatakan bahawa Kontrak yang diawadkan oleh Defendan kepada Plaintif yang bertarikh 2 September 2014 seperti yang diplidkan dalam Pernyataan Tuntutan tidak membenarkan Plaintif memfailkan Tuntutan di Mahkamah Sivil tetapi memerlukan Plaintif mengadjudikasi apa-apa isu dalam Timbangtara memandangkan bahawa Klausa 1 Surat Awad dengan jelas dan terang menyatakan bahawa terma-terma dan syarat-syarat Kontrak yang terpakai adalah 'Articles of Agreement and Conditions of Contract' dan 'PAM form of contract 2006 [without quantities]'.

3.1 Berdasarkan itu, Defendan memplid bahawa tuntutan ini wajar dibatalkan oleh kerana memungkiri terma Kontrak khususnya Klausa 29 Syarat PAM Conditions of Contract 2006 [without quantities] dan wajar digantung dan dirujuk kepada timbang tara berdasarkan seksyen 10 Akta Timbang Tara 2005.

3.2 Defendan akan membuat permohonan sewajarnya.'

[24] Premised on the above, I find and hold that the defendant did not harbour the intention to waive or abandon its right to have the dispute with the plaintiff determined via arbitration. It is clear that the defendant had reserved its right notwithstanding having simultaneously filed its defence. The defendant, in my view, had accordingly not taken a step in the suit for purposes of s 10 of the Arbitration Act 2005. I am aware that the defendant is worried of judgment in default of defence entered by the plaintiff if the defence was not filed. There seems to be no case authority in point to date and I wish to now clarify that upon the filing of an application under s 10 of the Arbitration Act 2005, the defence need not be filed until the disposal of that application and so ordered by the court.

[25] Nevertheless, I am mindful that the plaintiff also contended that the defendant had issued a third party notice to Magnificent Empire Sdn Bhd but which was subsequently withdrawn. I do not consider that the defendant had in this respect taken a step in this suit too by having filed the third party notice because a third party proceeding is generally considered as a separate and independent suit following the Supreme Court case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226.

CONCLUSION

[26] For the foregoing reasons, I therefore allow the application with costs to be in the cause of the arbitration.

Application allowed with costs.

Reported by Mohd Kamarul Anwar